UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES, Respondant, Appellee, v. WAYDE LYNN KURT, Petitioner, Appellant.	Case No. CR-10-114-WFN & CR-11-161-WFN BRIEF ON NOTICE OF APPEAL FOR CERTIFICATE OF APPEALABILITY

Comes now the petitioner, Wayde Kurt, acting pro se with this brief addressing the grounds for relief presented in his notice of appeal for certificate of appealability.

The district court, sua sponte denied the petitioner's § 2255 motion, the motion requesting court records as an indigent and denied certficate of appealability without ordering the government to respond and without an evidentiary hearing.

The petitioner presents Ground One and Ground Two from the original § 2255 motion.

GROUND ONE: Ineffective Assistance of Counsel: Failure to raise issue of factual errors made by the court and failure to object to directed verdict, the result of those errors.

GROUND TWO: Ineffective Assistance of Counsel: Failure to raise the issue of fear as the government's inducement of entrapment.

GROUND ONE

In the court order the judge misstates the petitioner's GROUND ONE issue, stating that the issue was entrapment (ORDER DENYING MOVANT"S § 2255 MOTION p. 3 l. 10-12, 16-18) and then procedes to argue entrapment as a reason for denial.

The issue underlying Ground One was a directed verdict and was clearly addressed in the petitioner's Memorandum in Support as a violation of due process, arguing, that whenever a defendant is denied the only defense available, by the court refusing to instruct the jury on that defense, then, this rises to the level of a directed verdict against the accused. The district court at two specific junctures during the trial stated that entrapment was the defendant's, Wayde Kurt's, only defense, (C.R. Kurt on Direct p. 726 l. 2-4 and Jury Instruction Conference p. 856 l. 8-12).

On direct appeal of this case circuit judge Tashima raised the constitutional issue of lack of due process, sua sponte, where it was not raised by appellate counsel or addressed by the full panel of circuit judges. Wherein, Judge Tashima likened the failure of instructing the jury on a defendat's only defense to directing a verdict against the defendant, citing Cronic the judge respectfully dissented from the majority. This is also the position of the 6th circuit "... Failing to instruct on only defense was plain error and tantamount to directing a verdict against the defendant." United States v. Wuliger, 981 F. 2d 1497, 1503 (6th Cir. 1992).

The petitioner's counsel failed to object to the directed verdict and failed to raise the issue on appeal as must be

inferred by Judge Tashima's explanation of his dissent, thus, making the issue of ineffective assistance of counsel ripe for address in a petition for relief under Title 28 U.S.C. § 2255 and was anticipated by the Supreme Court, "... There may be instances too, when obvious deficiencies in representation will be addressed by a appellate court sua sponte.", Massaro v. United States, 538 U.S. 500, 508, 155 L. Ed. 2d 714 (2003).

The failure to object to a directed verdict constitutes ineffective assistance of counsel even without the need to show prejudice which is presumed. Harding v. Davis, 878 F. 2d 1341, 1345-46 (11th Cir. 1989) (We hold that his silence at the point the verdict was directed against his client was so likely to prejudice Harding that the cost of litigating its effect is unjustified and prejudice is presumed. Cronic, 466 U.S. at 658, 104 S. Ct. at 2046 See also Rose v. Clark, 478 U.S. 570, 578, 106 S. Ct. 3101, 3106, 92 L. Ed. 2d 460 (1986).

Here also the 9th Circuit Court has held to the "per se" rule, citing Cronic, "... The second exception applies in only a narrow class of cases which trigger the "per se" rule of prejudice. In these cases, prejudice is presumed without any showing at all. Cases in which the per se rule applies are those in which there has been an actual or constructive denial of assistance." United States v. Perry, 857F. 2d 1346, 1349 (9th Cir. 1988) See also Hunter v. Moore, 304 F. 3d 1066, 1069 (11th Cir. 2002) citing Cronic "... A petitioner whose case presents such a circumstance need not make the specific showing of prejudice required by Strickland.

Ineffective assistance of counsel is presumed on the

face of it and this case should be remanded for retrial.

GROUND TWO

The issue underlying Ground Two was the failure of defense counsel to raise the issue of "fear" for family and friends that was induced by the actions an reputation of the government's confidential informant, wherein, the petitioner was compelled to aquire firearms at the confidential informant's request, leading to an entrapment defense. Instead defense counsel used only the issue of "reward" as inducement on direct appeal.

The district court, in its Order Denying Movant's § 2255 Motion (p. 5 l. 5-8), argues that "fear" as inducement leads to a "... defense of duress rather than entrapment ..." citing United States v. Saturley, 1989 WL 145363 at *1 (9th Cir. 1989)

This Saturley case is unpublished and case specific and is not quoted in any other cases. The petitioner presents that fear for family and friends was a legitimate factor for a claim of entrapment where the victim of assault and battery, Anthony Johnson, was the adopted homeless person of the petitioner and "fear" was considered to be a legitimate factor by the 9th Circuit concluding that "... A criminal defendant who acts out of fear does not forfeit his right to an entrapment defense simply because he agrees, seemingly without reluctance to commit a crime. The credibility of the defendant's explanation is for the jury to determine." United States v. Gurolla, 333 F. 3d 944, 956 (9th Cir. 2003).

It appears that fear induced by a government informant, and presented for an entrapment defense is allowed by current 9th Circuit standard.

The petitioner made a clear showing, in the original § 2255 motion, that the whole reason of calling the witnesses Anthony Johnson and his, then, girl friend, Melonie Howells, was to present their fear of the confidential informant's direct connection to a violent skinhead gang who had assaulted and battered Mr. Johnson. The petitioner presented their, and his own, testimony to that effect (C.R. Johnson on Direct p. 600 l. 20-23).

The defense counsel failed to raise this core issue of fear at the Jury Instruction Conference nor raised it on direct appeal. In the district court's order denying the petitioner's § 2255 motion the court did not examine the presented trial record to decide the merits of the "fear" issue versus the merits of the "reward" issue as inducement where only "reward" was brought on direct appeal, "... Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. ..." "..., the district court should be guided by the defendant's careful presentation of those issues which allegedly should have been raised on appeal, with accompanying citations to the trial record." Gray v. Greer, 800 F.2d 644,646 (7th Cir. 1985).

The district court then argues that the petitioner, in his original § 2255 motion, fails to present the evidence for impeachment of government witnesses, not presented by the defense counsel at trial, was sufficient to show ineffective assistance of counsel and the court cites Reynoso v. Giurbino,

(Court Order Denying Movant's § 2255 Motion p. 5 l. 10-15).

But this case law also shows that a defendant can overcome the presumption, "... a poor tactical decision may constitute deficient conduct if "the defendant [can] overcome the presumption that, under the circumstances the challenged action [or lack of action] 'might be considered sound trial strategy'" Reynoso v. Giurbino, 426 F. 3d 1099, 1113 (9th Cir. 2006).

In United States v. Spentz, 653 F. 3d 815, 818 (9th Cir. 2011) defense counsel is only required to show slight inducement by the government to get an entrapment defense. The requirement for effective assistance under Strickland v. Washington must be directly affected by this lowered requirement of Spentz therefore if an attorney cannot get an entrapment defense because he pursues a side issue rather than the main component of the defense this is very telling about that attorney's performance and effectiveness as guaranteed by the Constitution.

The petitioner presents two critical pieces of evidence that were absolutely "dead on point" to the reason defense witnesses were testifying about their fear of the confidential informant and the skinhead gang he was associated with. First was a recorded telephone conversation between the informant, David Udseth, and the leader of the skinhead gang and second was a news paper article closely related to that recorded conversation, neither of which were presented by defense counsel.

The recorded telephone conversation between David Udseth and the leader of the skinhead gang, Keegan Van Tuyl, has the confidential informant purportedly accepting leadership of the gang while Van Tuyl is incarcerated and he agrees to accept

recruits from prison sent out to him to join the gang. The revelation that this recorded telephone conversation exists was made through Bradey material given to the defense counsel consisting of transcripts of Keegan Van Tuyl's revocation hearing where the F.B.I. and the prosecutor, Earl Hicks (the same prosecutor on this case), characterize the confidential informant and his relationship, to the skinhead gang, established during the recorded telephone call as evidence of the extremely dangerous nature of the confidential informant and his leader Keegan Van Tuyl. The petitioner presented excerpts of the revocation hearing in his Memorandum in Support of the § 2255 motion (p. 13 l. 11-28 though p. 14 l. 1-18) establishing this fact, that a telephone recording existed that should have been used for impeachment.

The news paper article concerns the event as was covered in Keegan Van Tuyl's hearing concerning the testimony of Jason Shwan O'Dwyer who was the victim of Keegan Van Tuyl and his skinhead gang and was nearly beaten to death in a similar fashion as the defense witness, Anthony Johnson, had been a victim to them a few months earlier and O'Dwyer, like Johnson, was initially afraid to tell the police what realy happened. The O'Dwyer incident happened in Idaho where the skinhead gang was beginning to operate. This was reported in an extensive article in the February 7, 2010 Spokane Spokesman Review approximately the same time that David Udseth became a government informant. It was therefore public knowledge about the beating of O'Dwyer and was exactly the concern about what the confidential informant was telling him in relation to the danger Anthony

Johnson was in.

The defense counsel failed to obtain the telephone recording between Udseth and Van Tuyl and failed to present the news paper article available online. Both of these pieces of evidence would have been the backing necessary to convince the jury of the fear induced by the government's informant.

When the petitioner makes a proper showing that the evidence bearing on the claim of ineffective assistance of counsel exists outside of the trial record, such as the above recorded telephone record and news article, then the district court must order an evidentiary hearing to expand the record. "... The record does not show why the trial attorney failed to investigate, and the judge did not use his recollection of the events at issue to answer this question. Accordingly, the attorney's performance cannot be deemed effective without an evidentairy hearing..." United States v. Burrows, 872 F. 2d 915, 918 (9th Cir. 1989) See also Hawkin v. Hannigan, 185 F. 3d 1146, 1152 (10th Cir. 1999) ("... For example, counsel's failure to raise a "dead bang winner" on appeal - an issue that is both obvious from the trial record, and which would have resulted in reversal on appeal - constitutes ineffective assistance. See id. at 395. When counsel omits an issue under these circumstances, counsel's performance is objectively unreasonable because the issue was obvious from the trial record and the omission is prejudicial because the issue warranted reversal on appeal.").

Therefore this petitioner is entitled to a minimum of a remand for an evidentiary hearing and a response from the government as to Ground Two.

Further it was abuse of discretion for the district court to misstate the claims and then attack the mistatements.

STANDARD OF REVIEW

The petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2255 (c)(1)(A)(2). And the request must specify which claim or claims meet the "substantial showing" standard. The request for a certificate should be addressed first to the district court, United States v. Asrar, 116 F. 3d 1268 (9th Cir. 1997) which the district court has already done.

To make a substantial showing, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed 2d 1090 (1983). Rather, the petitioner need only show that the petition contains an issue (1) that is "debatable amoung jurists of reason"; (2) "that the court could resolve in a different manner"; (3) that is "adequate to deserve encouragement to proceed further"; or (4) "that is not squarely foreclosed by statute, rule or authoritative court decision, or ... [that is not] lacking any factual basis in the record." Id at 893 n.4 894 (internal quotations omitted). See also Slack v. McDaniel, 529 U.S. 473, 484, 146 L. Ed. 542 (2000) The defendant's claim meets all of these standards.

CONCLUSION

Wherefore this petitioner respectfully presents this brief on the notice of appeal for certificate of appealability to the Ninth Circuit Court of Appeals.

CERTIFICATE OF SERVICE

I, Wayde Kurt, do certify that I have placed in the U.S. Mail, first class postage pre paid, 1 copy of this Brief On Notice Of Appeal For Certificate Of Appealability addressed to the Clerk of the Court and signed under penalty of perjury.

Sean F. McVoy: Clerk of Court
United States District Court
For the Eastern District of Washington
840 U.S. Courthouse
920 W. Riverside Ave.
P.O. Box 1493
Spokane, WA 99210-1493

Executed 16 of May 2014
pursuant to 28 U.S.C. § 1746

Wayde Kurt
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